

itself has invited incumbents to provide precisely such information.^{35/} Indeed, the law is clear that the Commission must consider this evidence and establish such a mechanism simultaneously with the setting of the rates themselves.^{36/} In *Verizon Communications*, the Supreme Court concluded that it was premature to consider the ILECs' contention that TELRIC would produce a confiscatory result, because they did not challenge "particular, actual TELRIC rate[s]" and therefore it was uncertain whether TELRIC rates would enable incumbents to recover their past prudent investment or actual forward-looking costs. 535 U.S. at 524-28. The Court made clear, however, that once a state has determined specific UNE rates, those rates are subject to challenge on the basis that they fail to provide adequate compensation. *Id.* at 524. The Court further observed that the Commission had committed to considering "a challenge to TELRIC *in advance of a rate order*," provided that the challenge specifically showed how "a confiscatory rate is bound to result." *Id.* at 528 n.39 (emphasis added).^{37/}

Accordingly, *before* permitting the rates produced by the *Order* to go into effect, the Commission must evaluate Verizon VA's contention that those rates would produce a confiscatory result. Although the Supreme Court upheld the Commission's decision not to include past prudent

^{35/} See *Verizon Communications*, 535 U.S. at 524 (stating that UNE rates are subject to challenge as a taking at the time they are set); *Local Competition Order* at 15872 ¶ 739 (recognizing that incumbents have a right to petition the Commission if TELRIC rates fail to provide sufficient compensation).

^{36/} See, e.g., *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1176-1179 (D.C. Cir. 1987) (where regulated entity presents serious allegations that rates may result in a taking, the agency *must* consider those allegations and look at the relevant evidence; failure to do so is reversible error); *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (Constitution requires "reasonable, certain, and adequate provision for obtaining compensation at the time of the taking").

^{37/} The Due Process Clause of the Fifth Amendment also requires that a utility be afforded a meaningful opportunity to challenge rates as confiscatory. See, e.g., *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 593 (6th Cir. 2001); *Guaranty Nat'l Ins. Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990); *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1254 (Cal. 1989).

investment as part of the *methodology* for determining UNE rates, the Court did not relax the bedrock requirement of the Act and the Constitution to consider incumbents' claims that the *outcome* of that methodology is a confiscatory rate.

Under sections 251(c)(3) and 252(d)(1), UNE rates must be “just and reasonable” — a standard that has long been interpreted to require rates that are compensatory within the meaning of the Fifth Amendment. *See, e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70 (1968); *Federal Power Comm’n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). In other words, the Act does not authorize the establishment of a confiscatory rate for UNEs. *See Verizon Communications*, 535 U.S. at 489 (Act permits “novel ratesetting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, *short of confiscating the incumbents’ property*” (emphasis added)).

The standard for determining whether UNE rates have a confiscatory effect is whether they permit the incumbent to recover its unrecovered historical costs and its actual forward-looking costs.

For nearly a century, the courts have evaluated claims that rates are confiscatory by determining whether they permit the utility *to recover its investment*, along with a return. *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 601-04 (1944); *see also Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm’n*, 262 U.S. 276, 290 (1923) (Brandeis, J., joined by Holmes, J., concurring). Thus, in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), the Court considered whether a slight modification of a historical cost ratemaking methodology would produce a confiscatory result by determining whether the shift adversely affected investors’ opportunity to recover all their previous prudent investment and an appropriate rate of return under the old methodology. The Court determined that the new method was still projected to produce

recovery that was “within the constitutional range of reasonableness” *as measured under the old methodology*. *Id.* at 312. Under *Duquesne*, in other words, the new system must still provide for recovery of the investments made under the prior system *and* a return on that investment that would have been constitutionally sufficient under the old system. Indeed, in their concurrence, Justice Scalia, joined by Justices White and O’Connor, observed that, for courts to determine whether a rate methodology provided a constitutionally adequate “fair return,” “all prudently incurred investment may well have to be counted.” *Id.* at 527 n.37.^{38/}

In addition to unrecovered historical costs, a rate must also cover the actual forward-looking operating costs that the regulated entity will incur going forward. Thus, when the government compels the ongoing production of a good or service by a private party, the compensation provided must, at a minimum, cover the unavoidable costs of producing the good or service it has requisitioned and not force the entity to operate at a loss. In the case of UNEs, the incumbent is compelled to offer, maintain, and operate a portion of an *existing* network for the benefit of a third party. The ongoing capital costs and operational expenses of using that network in order to comply with this governmental mandate are unavoidable — they must be incurred in

^{38/} Likewise, the Commission itself has repeatedly recognized that incumbents are entitled to recover their unrecovered historical costs and stated its intention to provide such compensation. In the *Local Competition Order*, the Commission pledged that ILECs may “seek relief from the Commission’s pricing methodology if they provide specific information to show that the pricing methodology, as applied to them, will result in confiscatory rates” and stated that it intended to consider in its Access Reform Proceeding the creation of “a mechanism separate from rates for interconnection and unbundled network elements” to provide recovery of ILECs’ historical costs. *Local Competition Order* at 15872 ¶ 739; *Access Reform NPRM* at 21360-61 ¶ 7. In its *Universal Service Order*, the Commission again promised that it would address “legacy costs” in its Access Reform Proceeding. Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8901-02 ¶ 230 n.593 (1997).

order to offer the required facilities and services on an ongoing basis. These are costs that the government is not constitutionally free to ignore.^{39/}

The Commission, therefore, now has the duty to compare the *Order's* UNE rates to Verizon VA's past prudent investment and the actual forward-looking costs that Verizon VA can achieve in order to determine if the rates are confiscatory. The Commission cannot allow the *Order's* UNE rates to be made effective until and unless the Commission completes this evaluation. The Commission cannot defer its evaluation of Verizon VA's confiscation claim; it must ensure that Verizon VA is fully compensated within the meaning of the Constitution and the Act before it allows the *Order's* UNE rates to go into effect.^{40/} This requires the Commission (a) to define the legal standard for determining whether the UNE rates have a confiscatory effect, and (b) to evaluate the evidence to determine whether the *Order's* UNE rates are confiscatory under this standard. Because the Commission lacks authority to adopt UNE rates until it has completed this analysis, it must stay the *Order's* UNE rates pending the Commission's further consideration and determination of whether the *Order's* rates would provide adequate compensation.

And it is clear that the rates do not meet this test. As the Commission Staff has now concluded, even TELRIC-compliant rates do not provide appropriate cost recovery. As its policy paper concludes, "if investment costs are falling over time, and the period between TELRIC price adjustments is shorter than asset lives, then traditional TELRIC pricing will not permit incumbents

^{39/} *United States v. Pewee Coal Co.*, 341 U.S. 114, 117-18 (1951) (plurality opinion) ("When a private business is possessed and operated for public use, no reason appears to justify imposition of losses sustained on the person from whom the property was seized."); *United States v. General Motors*, 323 U.S. 373, 379-83 (1945) (holding that when property is occupied by government mandate, the owner is entitled to recover his actual costs based on his particular circumstances).

^{40/} *See supra* n.36.

to recover the cost of their investment.”^{41/} That shortfall is of course exacerbated by the *Order*’s radical interpretation of TELRIC here. Indeed, the rates resulting from the *Order* will permit Verizon VA to recover neither its unrecovered historical costs nor its actual forward-looking costs. For example, the UNE-P rates produced by the *Order* are less than half the unrecovered historical cost of providing the UNE-P. *See* Garzillo Decl. ¶ 29. And those rates likewise are well below Verizon VA’s *actual* forward-looking costs. *See id.* ¶ 31.

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The net effect of the *Order*’s decisions is to drastically reduce rates that were already TELRIC-compliant, and to create new and increased subsidies for CLECs that rely on UNEs. The *Order*’s errors were compounded by the Bureau’s refusal even to consider directly relevant evidence that Verizon VA sought to introduce almost a year before the *Order* was issued — evidence that would have showed that many of the assumptions on which the Bureau’s *Order* is based are outdated and unsupportable. *See* Verizon Virginia Inc.’s Motion to Permit Parties to Supplement the Record (Nov. 22, 2002); Verizon Virginia Inc.’s Proffer of Supplemental Evidence (April 15, 2003). For example, Verizon VA’s proffer included evidence on the appropriate adjustments to reflect both the risks inherent in a competitive market and the added unique risks associated with competitors’ use of unbundled elements to provide service — risks that the Commission has clarified must be reflected in the cost of capital. Similarly, Verizon VA’s

^{41/} David M. Mandy & William W. Sharkey, *Dynamic Pricing and Investment from Static Proxy Models*, OSP Working Paper at 1 (Sept. 2003); *see also id.* at 1-2 (“Indeed, when investment costs are falling over time and TELRIC price reviews are conducted at intervals shorter than expected asset lives, the firm will earn less than its target rate of return under traditional implementations of TELRIC.”); *id.* at 43 (“When investment costs are falling by 11% per year (as is assumed for switching assets in the FCC Synthesis Model), the TELRIC correction factor is approximately 50%. That is, switching prices should be increased by 50% from those suggested by Synthesis Model runs.” (emphasis added)).

proffer included evidence showing that its experience since the initial cost studies submitted in this case demonstrates that wholesale uncollectible rates are substantially higher than the proxy (based on traditional access and similar services) used in its studies. The *Order's* failure to consider this and other evidence further understates rates.

II. The Balance Of Equities Weighs Decisively In Favor Of A Stay Because The *Order* Would Cause Irreparable Harm And Is Contrary To The Public Interest With No Countervailing Harm to CLECs.

If a stay is not granted, the public interest generally, and Verizon VA in particular, will suffer certain and immediate irreparable injuries. In contrast, the CLECs will suffer no harm if the *Order* is stayed pending review. In such circumstances, a stay is warranted.^{42/}

As numerous investment analysts have recognized, Verizon VA is already incurring substantial financial losses due to the purely synthetic competition created by the availability of UNE-P at TELRIC rates. For example, the May 1, 2002 quarterly report from Commerce Capital Markets concluded that “[f]or all RBOCs, UNEs are priced below cash operating cost, and radically below total operating cost including depreciation and amortization. The discounts from total cost are 50%-60% below total cost even when total cost does not include cost of equity, a component that is allowed under TELRIC.”^{43/}

^{42/} See, e.g., *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 54-55 (D.D.C. 2002) (“In light of . . . the possible inability to provide meaningful and complete relief to [the party] if it is ultimately successful . . . , the weighing of the equities in this matter tips the scales in favor of [that party].”); Memorandum Opinion and Order, *AT&T Corp., et al., v. Ameritech Corp.*, 13 FCC Rcd 14508, 14521 ¶ 27 (1998).

^{43/} A. Kovacs et al. Commerce Capital Markets, Inc., *The Status of 271 and UNE-Platform in the Regional Bells' Territories* at 15 (May 1, 2002) (emphasis added); *id.* (“[R]egulators are forcing RBOCs to wholesale their network at rates that are significantly below the costs that the financial community looks at.”); M. Crossman et al, J.P. Morgan Securities, Inc., *Industry Update – No Growth Expected for Bells in 2003* at 15 (July 12, 2002) (“For all RBOCs, UNEs are priced below cash operating cost, and radically below total operating cost including depreciation and

A stay is necessary to prevent these losses from growing exponentially. Based on Verizon VA's initial review of the ordered inputs, the *Order* will result in radical reductions to UNE rates. For example, the end-office switching rate is the lowest of any jurisdiction served by Verizon. Garzillo Decl. ¶ 13. Similarly, the UNE-P rate for residential customers in zone 1 under the *Order* — where approximately three-quarters of the lines in Virginia are located — is the second lowest when compared to similar rates in every one of the thirty-one jurisdictions where Verizon provides service. Id. ¶ 14. And the non-recurring rates have been slashed dramatically: for example, the non-recurring charge for installing a new unbundled loop is decreased by more than 90 percent to less than \$5.00. Id. ¶ 16. These rate reductions will cause Verizon VA's losses to grow dramatically because it will recover even fewer of its costs for every UNE-P it provides and it will lose even more customers and the associated retail revenues. The courts and the Commission have recognized that such substantial financial losses can in and of themselves constitute irreparable harm.^{44/}

The *Order* also will cause irreparable injury because the approximately 50% reduction in high capacity loop rates will result in significantly lower rates for EELs. Combined with the Commission's new rules concerning the availability of EELs, the *Order*'s rate reductions will

amortization. The discounts from total cost are 50%-60% below total cost even when total cost does not include cost of equity . . .").

^{44/} See, e.g., Memorandum Opinion and Order, *TCI Cablevision of Dallas, Inc.*, 15 FCC Rcd 7379, 7381 ¶ 6 (2000) (granting preliminary injunctive relief where company faced irreparable harm if its scheduled rate increase was delayed, because "it lack[ed] assurance it [could] later recoup lost revenue in an increasingly competitive marketplace"); see also *Petereit v. S. B. Thomas, Inc.*, 63 F.3d 1169, 1186 (2d Cir. 1995); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43 (D.D.C. 2000) (financial losses "above and beyond a simple diminution in profits" constitute irreparable harm); *McGregor Printing Corp. v. Kemp*, Civ. A. No. 91-3255, 1992 WL 118794, at *5 (D.D.C. May 14, 1992) (finding "irretrievable monetary loss" to plaintiff amounted to irreparable harm).

cause widespread conversion of special access services to EELs. *See* Garzillo Decl. ¶¶ 34-36. As the Commission has explained, such dislocation will have “severe consequences” for the special access market.^{45/} In particular, the Commission concluded that, while special access is a “mature source of competition,” conversion of special access service to below-cost EEL prices will “undercut the market position of many facilities-based competitive access providers.” *Id.* That is precisely what the *Order* would do to the market in Virginia.

The *Order* also will cause Verizon VA to lose customers and goodwill as CLECs take advantage of the arbitrage opportunities and subsidies resulting from the dramatically lower rates. The courts have recognized that, “when the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor . . . the irreparable injury prong is satisfied.” *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994). As the Commission has explained in words equally applicable here, “Petitioner [is] already losing customers to [the CLECs] and, if we do not order a standstill, they are likely to continue to do so. If we later find the agreement to be unlawful, it will be very difficult to remedy these losses without serious disruptions in service to the public and, indeed, it is possible that customers who have migrated to [the CLECs] pursuant to the agreement will never return to their previous carriers.”^{46/}

^{45/} Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, 9598 ¶ 18 (2000).

^{46/} *See, e.g.*, Memorandum Opinion and Order, *AT&T Corp., et al., v. Ameritech Corporation and Qwest Communications Corp.*, 13 FCC Rcd at 14512-13, 14521, 14523 ¶¶ 8, 27, 32-33; Memorandum Opinion and Order, *CBS Communications Servs., Inc.*, 13 FCC Rcd 4471 (1998); *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001) (finding that the loss of established goodwill because of higher rates may result in irreparable harm); *see also Illinois Bell Tel. Co. v. MCI Telecom. Corp.*, No. 96 C 2378, 1996 U.S. Dist. LEXIS 18337, at *26-*27 (N.D. Ill. Dec. 3, 1996 (“[I]t is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of goodwill, that flow from such

Nor is there any plausible claim that the harms are merely the result of competition. On the contrary, the opposite is true. Permitting the *Order* to go into effect would irreparably harm Verizon VA by severely constraining its ability to compete in the marketplace, an injury the Commission and the courts have recognized as constituting irreparable harm.^{47/} Verizon VA, like any carrier, must face real competition from wireless, cable, and other facilities-based providers. But it will be severely compromised in its ability to do so if it must, at the same time, subsidize competitors that use its network to provide service and capture its market share. The rates resulting from the *Order* would exacerbate this problem by further increasing those subsidies. CLECs using UNEs could severely undercut Verizon VA's prices, while Verizon VA would be forced to charge its remaining customers much higher rates if it hoped to recoup its costs. Even if the rates are eventually reversed on review, Verizon VA has no guarantee that it will be able to regain the competitive position that it lost as a result of the unlawful rates.

A stay is also necessary to protect the public interest. The reduced UNE-P rates produced by the *Order* will reduce facilities-based competition in Virginia even further. The October 2002 rate reductions already have caused a shift from facilities-based competition to UNE-P: the number of UNE-P lines has escalated from approximately 49,000 lines at the time of the reductions to 250,000 by September 2003, while the number of UNE-P lines added monthly has grown from 4,000 to a current monthly run rate of approximately 25,000. *See* Garzillo Decl. ¶ 22.

[intangible harms]. Loss of market share is also irreparable injury, because market share is difficult to recover") (citations omitted).

^{47/} *See, e.g.,* Memorandum Opinion and Order, *In re Applications of Petroleum Communications, Inc.*, FCC File No. 30003-CL-P-84, 1985 FCC LEXIS 2515, at *3 (rel. Sept. 30, 1985) (finding irreparable harm where petitioner "will be competitively disadvantaged" if its competitor could serve certain customers, "even temporarily."); *Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 929-30, 951-52 (D.C. Cir. 1976) (granting stay where petitioners faced losses from "acute competitive disadvantage").

This increase in UNE-P has come at the expense of facilities-based competition. For example, while competitors were adding nearly 16,000 lines per month in whole or in part over their own facilities prior to the rate reduction, that number has dropped by more than half. *See id.* ¶ 23. And, while competitors were adding more than 1,500 lines per month using their own switches together with unbundled loops prior to the rate reduction, competitors have been shedding an average of more than 1,800 such lines each month since. *See id.* The total number of UNE-L lines that competitors are now serving in Virginia is actually *lower* than it was as of year-end 2001. *See id.* ¶ 24.

Exacerbating this trend through even lower UNE rates would be contrary to the public interest. Consumers benefit through the development of facilities-based competition, since only such competition produces product differentiation and genuine choice. On the other hand, the “competition” generated by overly low UNE rates is “synthetic” and does not further “Congress’s purposes” — that is, the promotion of “investment and facilities-based competition.” *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002), *cert. denied, sub nom. WorldCom, Inc. v United States Telecom Ass’n*, 123 S. Ct. 1571 (2003). Instead, as numerous investment analysts have concluded, low UNE-P rates deter investment in facilities by *all* carriers and devalue existing facilities investment. As independent analysts at McKinsey & Co. and JP Morgan have explained, “[n]o company will deploy and scale facilities if it can achieve similar economics immediately by renting network elements from the ILECs – all with little up-front investment.”^{48/} Similarly, as Scott Cleland of the Legg Mason Precursor Group put it, “why

^{48/} McKinsey & Co. and JP Morgan H&Q, *Broadband 2001, A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market* at 18 (Apr. 2, 2001); *see also Hearings before the Subcomm. on Telecommunications Trade & Consumer Protection of the House Commerce Comm.*, 106th Cong. 2 (May 25, 2000) (Written statement of

overbuild if one can lease it more cheaply than one can build it?”^{49/} Simply put, “UNE-P functions like a tax on investment, rather than a competitive incentive,”^{50/} and that effect is necessarily aggravated by lower UNE-P rates. And allowing the below TELRIC rates produced by the *Order* to go into effect would result in massive and unjustifiable disruption in the period until it is reversed.^{51/}

Moreover, the harm to competition threatened by the *Order* will not necessarily be limited just to Virginia. Even if the *Order* is eventually reversed, as it must be, it is likely to be used in the interim to distort other state commission UNE rate decisions. While the *Order* has no binding effect on state commissions in their own UNE arbitration proceedings,^{52/} CLECs already have and inevitably will continue to portray this decision as representing an authoritative interpretation of

Scott Cleland, Managing Director, The Precursor Group) (“Cleland Statement”) (“[T]he macroeconomic consequences of the FCC’s TELRIC fiat was to devalue three quarters of the Nation’s telecom infrastructure by two-thirds.”).

^{49/} Cleland Statement at 2; *see also* Scott Cleland, Precursor Group, *Why UNE-P Is Going Away: Telecom Competition’s Changing Trajectory* (Oct. 2, 2002); Gregory P. Miller, et al., Fulcrum Global Partners, *Wireline Communications: Thoughts on FCC Order* at 2 (Feb. 25, 2003) (“Six years following the Act, we are left with virtually no structural incentive for any company to ever build an alternative local network that will compete with local carriers over time”).

^{50/} *See* Scott Cleland, Precursor Group, “*Why UNE-P Is Going Away: Telecom Competition’s Changing Trajectory*” (Oct. 2, 2002).

^{51/} The Commission has recognized such market disruption warrants a stay. *See, e.g.,* Memorandum Opinion and Order, *American Telephone and Telegraph Company, Revisions to Tariff No. 260 Establishing Rates for Leased Voice-Grade Channels and 48 kHz Channels between the U.S. Mainland and Hawaii*, 70 F.C.C.2d 1297, 1300-01 ¶ 9 (1978) (“[I]t is our judgment that the public interest benefits gained by delaying for five months imposition of a rate whose lawfulness is in question is outweighed by the public interest benefit of allowing prices to stabilize as a result of normal competitive marketplace interaction.”).

^{52/} *See, e.g.,* *MCIMetro Access Transmission Servs. L.L.C. v. BellSouth Telecomm., Inc.*, No. 5:01-CV-921-H(4), at 13-14 (E.D.N.C. Jan. 18, 2003) (noting that Bureau *non-cost* arbitration decision was non-binding because it was not final agency action and because the Bureau was merely “acting in the place of a state commission”).

TELRIC by the Commission. Indeed, in a letter it recently filed with the Maryland Commission, Covad portrayed the *Order* as a “ruling issued . . . by the Federal Communications Commission” and cited it in support of Covad’s extreme proposals concerning non-recurring rates.^{53/} Where a decision will have “far reaching impact . . . the status quo should be maintained until” the reviewing body “has spoken.”^{54/} Nor would the effects of the *Order* be easy to unwind: even if it were swiftly reversed, Verizon VA would have to go back and try to win back customers it lost because of artificially low UNE rates in numerous jurisdictions. As the Commission itself has recognized, where it would be “virtually impossible to ‘unscramble’ the effects” of a decision and “return to the current status quo,” the “public interest factors . . . weigh heavily in favor of granting the standstill order.” *AT&T Corp. v. Ameritech Corp.* at 14519-20 ¶ 24.

The true-up required in the *Order*, see *Order* ¶ 26, cannot fully redress all these harms. Even if the true-up compensates Verizon VA for some measure of the losses it will incur as a result of the *Order*, a true-up cannot redress the devaluation of Verizon VA’s investment or the

^{53/} Covad Letter to Md. Pub. Serv. Comm’n, Case No. 8879 (Sept. 4, 2003); see also Letter from David Carpenter, Counsel for Voices for Choices and AT&T, to Gina Agnello, Clerk, U.S. Court of Appeals for the Seventh Circuit, at 1 (Sept. 9, 2003) (stating that the Bureau’s *Order* “confirms” that AT&T’s positions are consistent with TELRIC); Ex Parte Submission of AT&T Communications of California, Inc. (U5002C), “Comparison of Cost Models and Studies,” *Joint Application of AT&T Communications of California, Inc. (U5002C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050, et al.* (Sept. 26, 2003) (referring throughout to the *Order*’s determinations for support); cf. *AT&T Communications of NJ, L.P. et al. Amended Petition for Arbitration of Interconnection Terms and Conditions with Verizon New Jersey Inc.*, Docket No. TO00110893, at 12 (N.J. Bd. Of Pub. Utils. Nov. 6, 2002) (stating that the Bureau’s decision on *non*-cost issues “reflects the reasoned application by the FCC of the very rules that Congress charged it with crafting”).

^{54/} *Anderson v. City of Philadelphia*, C.A. No. 86-7571, 1987 U.S. Dist. LEXIS 8843, at *6-*7 (E.D. Pa. 1987) (granting stay pending appeals court decision that would determine validity of use of polygraph tests in hiring where many similar cases were pending in other districts).

harm to facilities-based competition that will result from the CLEC subsidies created by the *Order's* rates. And the effect of the *Order's* low rates can be expected to spread: there is no prospect that CLECs will engage in rational negotiations to produce more realistic rates now that the *Order* has set a new, low price ceiling.

Finally, a stay would not cause harm to CLECs. It would simply preserve the *status quo*, which is the proper role of injunctive relief.^{55/} A stay would keep in place the UNE rates that the Commission has already determined are TELRIC-compliant. *See Virginia 271 Order* at 21929 ¶ 89. Moreover, the existing rates in Virginia are lower than the corresponding rates in New York, where CLECs already have taken approximately two million lines as UNE-Ps. Indeed, as noted above, since the current rates went into effect in Virginia, use of UNE-P has grown dramatically. Thus, “there is little indication that a stay pending appeal will result in substantial harm to the” CLECs.^{56/}

On the contrary, a stay would leave in place rates that already produce an enormous subsidy and provide CLECs with a large profit margin. A Legg Mason study showed that UNE-P yields average gross margins ranging from 47% to 66% in numerous Verizon states.^{57/} And AT&T's Consumer Services president and CEO has assured investors that AT&T is not “going into states where we don't have a *gross margin of 45 percent on the local*. That's kind of our

^{55/} See, e.g., *District 50, United Mine Workers of America v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969) (“The usual role of preliminary [relief] is to preserve the status quo pending the outcome of litigation.”).

^{56/} *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); see also *Multi-Channel TV Cable Co.*, 22 F.3d at 553 (balance of equities favors a stay where status quo permits both parties to “compete in an open market”)

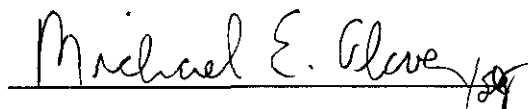
^{57/} Michael J. Balhoff, et al., Legg Mason, *UNE-P Relief: Investors Expect Too Much* at 9 (Dec. 19, 2002).

threshold trigger to go in”^{58/} Because AT&T is already providing local service using UNEs in Virginia,^{59/} it already has a substantial profit margin in Virginia even under the current rates, and the *Order* would simply inflate those profits dramatically. Indeed, as a result of its margins, AT&T already is able to achieve “single customer payback as soon as 11 months,” an extremely short time period for a new customer.^{60/} Thus, a stay will cause no harm to CLECs and should be granted.

CONCLUSION

For the foregoing reasons, the Commission should stay the *Order*.

Submitted by



Lynn R. Charytan
Samir C. Jain
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, DC 20037-1420
(202) 663-6000

Michael E. Glover
Karen Zacharia
Leslie V. Owsley
Donna M. Epps
Verizon
1515 North Court House Road
Fifth Floor
Arlington, Virginia 22201
(703) 351-3100

Dated: September 29, 2003

^{58/} Statement of Betsy Bernard, AT&T Consumer Services President and CEO, *Q2 2002 AT&T Earnings Conference Call – Final*, Fair Disclosure Wire, Transcript 072302au.729 (July 23, 2002) (emphasis added).

^{59/} See AT&T Newsroom, <http://www.att.com/news/> (news release announcing AT&T entry into Virginia).

^{60/} David Dornan, AT&T Chairman and CEO, Sanford Bernstein Strategic Decisions Conference at 10 (June 4, 2003).

CERTIFICATE OF SERVICE

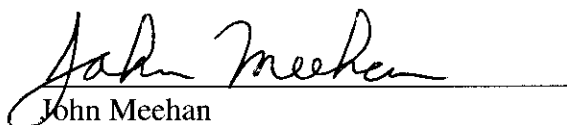
I do hereby certify that true and accurate copies of the foregoing, Verizon Virginia Inc.'s Motion for Stay, were served by hand delivery via courier this 29th day of September, 2003, to:

Mark A. Keffer
Dan W. Long
Stephanie Baldanzi
AT&T
3033 Chain Bridge Road
Oakton, Virginia 22185

Allen Feifeld, Esq.
Kimberly Wild
WorldCom, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036

David Levy
Sidley, Austin, Brown & Wood
1501 K Street, N.W.
Washington, D.C. 20005

Jodie L. Kelley
Jenner & Block LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005


John Meehan